

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2735

Cir. Ct. No. 2012TP20

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO ALIYANA G.-B., A PERSON
UNDER THE AGE OF 18:**

BARRON COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

CHRISTOPHER B.,

RESPONDENT,

MARIA A.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Barron County:
JAMES D. BABBITT, Judge. *Affirmed.*

¶1 STARK, J.¹ Maria A. appeals an order terminating her parental rights to her daughter, Aliyana G.-B. Maria argues the evidence was insufficient to establish she failed to assume parental responsibility of Aliyana. Maria also argues the Barron County Department of Health and Human Services violated her substantive right to due process. We disagree and affirm.

BACKGROUND

¶2 Maria gave birth to Aliyana in December 2008. In July 2011, the Department removed Aliyana from Maria's care. Aliyana was found to be a child in need of protection or services, and she was placed in foster care. On November 15, 2012, the Department petitioned to terminate Maria's parental rights to Aliyana on the grounds that Aliyana remained a child in continuing need of protection or services (continuing CHIPS), *see* WIS. STAT. § 48.415(2), and that Maria failed to assume parental responsibility, *see* WIS. STAT. § 48.415(6). Maria contested the petition, and the court scheduled a jury trial.

¶3 At trial, social worker Jessica Wager testified that from 2009 to 2011, thirteen reports were made concerning Maria's care of Aliyana. These reports involved Maria's unrealistic expectations for Aliyana, homelessness, Maria's bizarre behaviors, and Maria's inability to meet Aliyana's nutrition needs. Two reports resulted in voluntary service agreements; however, Wager explained that Maria would not accept the services—"[O]ne day she would want help, and the next day she would deny that there was anything wrong."

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 Wager testified that, in July 2011, Maria brought Aliyana to the Department because Maria was having difficulty controlling Aliyana. Maria told the intake social worker that Maria believed Aliyana “might be hearing voices like [Maria] hears voices[.]” and that “Aliyana is great right now but behind closed doors she is the devil[.]” Maria admitted being diagnosed with schizophrenia, and she reported she received mental health services in the past and her current mental health was “up and down.”

¶5 Ultimately, given the history and multiple child protective services reports, the Department removed Aliyana from Maria’s care on the basis of neglect and placed Aliyana in foster care. Wager testified Maria admitted to the neglect allegation and Aliyana was found to be a child in need of protection or services. Maria was court ordered to complete certain conditions to have Aliyana returned to her care.

¶6 Wager then testified about Maria’s progress toward completing the conditions for return and the Department’s efforts to help her satisfy those conditions. Maria was successful in meeting some of the conditions, such as maintaining appropriate housing, completing a parent evaluation, and applying for and receiving disability benefits.

¶7 Wager testified that the stability of Maria’s mental health was one of the main concerns of the case. Wager was aware of reports from Maria’s nurse practitioner that Maria was not taking her medication as prescribed. Wager also explained the Department referred Maria to the Barron County Community Support Program, which would have provided medication monitoring. However, the Community Support Program would not accept Maria, telling Wager that Maria’s diagnosis was an “‘access to mental health’ diagnosis And that they

don't accept 'access to' diagnoses in that program." No other service was put in place to ensure that Maria took her medications on a daily basis.

¶8 Psychologist Harlan Heinz, who evaluated Maria, testified that medication is "very, very helpful" in treating schizophrenia and helps control hallucinations and/or delusions that a person may experience. He stated Maria knew she was obligated to take her medication and self-reported that she did not take her medications as prescribed. Heinz explained Maria's admission was significant because it indicated Maria "realizes she wasn't doing what she was supposed to do; and that the inconsistency ... does interfere significantly in her treatment." He stated Maria was not compliant with the services being offered because she was opposed to taking the information and using it.

¶9 Heinz also observed interactions between Maria and Aliyana. Heinz opined that Maria was unable to care for Aliyana safely without appropriate supervision and that Maria was not fit to be a parent. Additionally, he testified that, although he observed a bond and love and affection between Aliyana and Maria, he could not say that Aliyana recognized Maria as her mother.

¶10 Social worker Wager also testified Maria was unable to demonstrate her ability to provide a safe and stable environment for Aliyana. Wager explained that, although Maria maintained regular contact with Aliyana, had visitation with Aliyana for forty hours per week during some periods of placement, and loved Aliyana, Maria struggled with appropriate interaction, supervision in the community, and consistency. Maria also intentionally antagonized Aliyana.

¶11 Maria's visits with Aliyana were supervised by either Mary Matthys or Laurie White. Both Matthys and White noted differences in Maria's ability to parent based on changes in Maria's mood. Matthys stated that, when Maria was

having a good day, she would tend to let Aliyana do whatever she wanted. But, when Maria was having a bad day, she would become harsh very quickly with Aliyana. White stated, “[v]ery seldom did Maria ... maintain self-control when disciplining. She screamed; she yelled. [V]ery stern, very scary sometimes.” White also described a day when Maria was agitated, in a bad mood, and short with Aliyana. Maria told White that she was going to take her medication so that White could observe how she was on her medication. White stated that approximately thirty minutes later, Maria was pleasant and calm, used the parenting techniques she was taught, and had a great day with Aliyana.

¶12 Matthys and White testified Maria had unrealistic expectations for Aliyana. Maria would frequently call four-year-old Aliyana her newborn. White testified that Maria would carry Aliyana around and feed her in a high chair, even though Aliyana could feed herself. White explained that, “on the other side of the coin,” Maria would have Aliyana wash her own hair, which White stated was not age-appropriate. Additionally, both Matthys and White described inappropriate conversations Maria had with Aliyana. For example, Maria would talk about Aliyana’s father being in jail and about her uncle being in jail. Those discussions upset and concerned Aliyana. Maria also told Aliyana her younger brother “had taken her place,” and she would “threaten that ... Aliyana ... would ... end up with [her foster parents] or that they would take her awa[y] ... if she continued to ... tell lies about [Maria].”

¶13 Matthys and White also discussed safety concerns they had about Maria’s care of Aliyana. Matthys stated Maria would not consistently hold Aliyana’s hand in parking lots. White described an incident where Maria allowed Aliyana to lie down in the traffic area of a parking lot. There were also times when Maria would leave Aliyana alone in the bathtub, and White stated one time

she had to intervene because Aliyana began climbing and almost fell. Maria would also leave Aliyana and her six-month-old brother unsupervised in the apartment while she went to the car. White testified that Maria was told that she could not lie down with Aliyana for naps because of safety issues but the next day Maria did so anyway. White also explained that, even though the Department told Maria she could not hit Aliyana, White observed Maria hit Aliyana on seven or eight occasions, and on some of those occasions Aliyana was not misbehaving.

¶14 Matthys testified that Maria engaged Aliyana in age-appropriate playtime activities and White also testified one of Maria's strengths was that she was very good at playing with Aliyana. Matthys opined there is a bond between Maria and Aliyana and Maria loves Aliyana. White stated, "there were times that [Maria] was very loving. And then there were times when [Maria] was screaming and very mean to [Aliyana.]" As examples, White stated Maria would engage in "a kind of a cruel type of teasing where she would [say], 'I'm taking your dolls away[]' and "there w[ere] times where she sat on her and wouldn't get up. Or she had put her in the high chair and wouldn't remove her from the high chair when her daughter cried and cried and cried to get out of the high chair."

¶15 Maria did not testify.

¶16 During closing arguments, for the failure to assume parental responsibility ground, the Department argued:

This child was removed from her mother's home in July of 2011. This Friday will be the two-year anniversary since this child was removed from her home. And that since that time, but for a – but for a very brief period of time, [Maria] has not had any unsupervised contact with her daughter. She's not there when Aliyana gets up in the morning. She's not there when Aliyana goes to bed at night. Those are very commonplace, normal things that parents encounter every day in their experience in raising their

children. It is one of the most basic things are [sic] raising a child. And for the last two years [Maria] has been absent in the morning and has been absent in the evening.

The Department also argued that Maria only had the opportunity to feed Aliyana lunch on the days she visited with her from 8:00 a.m. to 4:00 p.m. The Department then highlighted the reasons Aliyana was removed from the home, Maria's inability to apply parenting techniques, the incidents where Maria left Aliyana unattended in the bathtub and allowed her to lie down in the middle of the parking lot, and Maria's mental health as it impacted her ability to care for Aliyana.

¶17 Maria's attorney responded to this argument by saying:

And, basically, he talks about not being there in the morning, not being there tucking her into bed. Whose responsibility [is] that? The Department's keeping her away from her child and [from being] able to get up in the morning and, [putting] her into bed. The Department has kept her away.

Maria's attorney went on to address the Department's efforts to help Maria reunite with Aliyana. He criticized the Department's handling of Maria's mental health issues, arguing Maria should have been seeing a psychiatrist, not a nurse practitioner. Further, he argued the Department had not been conscientious in assisting Maria with taking her medications.

¶18 Ultimately, the jury did not find that grounds were proven to terminate Maria's parental rights based on the continuing CHIPS. On that ground,

the jury found the Department had not made “reasonable efforts.”² The jury did, however, find Maria failed to assume parental responsibility.

¶19 Following a dispositional hearing, the court concluded it would be in Aliyana’s best interests to terminate Maria’s parental rights, and the court terminated Maria’s parental rights.

DISCUSSION

I. Insufficient Evidence

¶20 Maria first argues the evidence presented at the jury trial was insufficient to establish the ground of failure to assume parental responsibility. When reviewing the sufficiency of the evidence, we use a highly deferential standard of review. *State v. Quinsanna D.*, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. We sustain the jury’s verdict if there is any credible evidence to support it. *Id.* We search the record for evidence that supports the verdict, accepting any reasonable inferences the jury could reach. *Id.* However, whether the evidence, viewed in the light most favorable to the jury, is sufficient is a question of law that we review independently. *Tammy W-G. v. Jacob T.*, 2011 WI 30, ¶17, 333 Wis. 2d 273, 797 N.W.2d 854.

² To prove the continuing CHIPS ground, the Department needed to show that: (1) Aliyana was adjudged in need of protection or services and had been removed from the home for six months or longer pursuant to a court order containing the required warnings; (2) the Department made reasonable efforts to provide the court-ordered services; (3) Maria failed to meet the conditions established for Aliyana’s return; and (4) there was a substantial likelihood that Maria would not meet those conditions within the nine-month period following the trial. *See* WIS. STAT. § 48.415(2)(a); *see also* WIS JI—CHILDREN 324A (2011).

¶21 The Department bears the burden of proving the termination ground by clear and convincing evidence. *See* WIS. STAT. § 48.31(1). The ground of failure to assume parental responsibility is “established by proving that the parent ... ha[s] not had a substantial parental relationship with the child.” WIS. STAT. § 48.415(6)(a). “Substantial parental relationship” is defined by statute as “the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child.” WIS. STAT. § 48.415(6)(b).

In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Id.

¶22 “[A] fact-finder must look to the totality-of-the-circumstances to determine if a parent has assumed parental responsibility.” *Tammy W-G.*, 333 Wis. 2d 273, ¶22. With regard to the relevant time period, “the fact-finder should consider a parent’s actions throughout the entirety of the child’s life[.]” *Id.*, ¶23. Moreover, “under a totality-of-the-circumstances analysis, the fact-finder can and should consider the reasons why a parent has not supported or cared for her child.” *Id.*, ¶32. A fact-finder may also “consider whether, during the time the parent was caring for his [or her] child, he [or she] exposed the child to a hazardous living environment. Supervision, protection and care of a child, by definition, involve keeping that child out of harm’s way.” *Id.*, ¶37.

¶23 Maria argues the evidence was insufficient to support the failure to assume parental responsibility ground because “Maria was the primary caregiver for the first two and a half years of Aliyana’s life, and maintained her relationship with Aliyana after the [Department] placed Aliyana in a foster home.” (Some capitalization omitted.) She contends her relationship with Aliyana is in “stark contrast” to that of the father in *Tammy W-G.*, who was determined to have failed to assume parental responsibility after caring for his daughter for only the first four months of the child’s life, only seeing her two or three times after he moved out of state, and providing no financial or other support after he left. *Id.*, ¶¶39-44. She also asserts that the jury could not have determined she exposed Aliyana to a hazardous living environment because the evidence showed her apartment, where many visits were conducted, was not a safety issue and there was no evidence that she exposed Aliyana to illegal activities.

¶24 Although it is clear that Maria cared for and remained in contact with Aliyana more than the father in *Tammy W-G.*, the length of time Maria cared for Aliyana and the amount of visitation Maria had after Aliyana’s removal does not by itself establish that Maria had a “substantial parental relationship” with Aliyana. Rather, as stated previously, the fact-finder is to consider the parent’s actions throughout the child’s entire life and determine whether, under the totality of the circumstances, the parent has “accept[ed] and exercise[d] ... significant responsibility for the daily supervision, education, protection and care of the child.” *Tammy W-G.*, 333 Wis. 2d 273, ¶¶22-23; *see also* WIS. STAT. § 48.415(6)(b).

¶25 We conclude there was sufficient evidence to support the jury’s verdict that Maria failed to assume parental responsibility. First, the evidence showed that, although Maria cared for Aliyana for the first two-and-one-half years

of her life, child protective services began receiving reports within months of Aliyana's birth regarding Maria's unrealistic expectations for Aliyana, homelessness, Maria's bizarre behaviors, and Maria's inability to meet Aliyana's nutritional needs. Wager testified Maria admitted to neglecting Aliyana.³

¶26 Additionally, although there were no safety concerns in Maria's apartment itself, the evidence showed that Maria did not exercise supervision, protection and care necessary to keep Aliyana out of harm's way. Specifically, Maria left Aliyana unattended in the bathroom on multiple occasions—one time causing White to intervene—and she would not consistently hold Aliyana's hand in parking lots—one time allowing her to lie down in the middle of a traffic area. Moreover, although the evidence showed Maria could be loving and affectionate toward Aliyana and would play with her, the evidence also showed that Maria would, in essence, harass Aliyana by threatening to throw away her toys, telling Aliyana she had been replaced by her younger brother, telling her she was being kidnapped and needed to stop telling lies about Maria, and trapping her in a high chair. White also testified that she observed Maria hit Aliyana on occasions when Aliyana was not misbehaving and that Maria lacked self-control and would become "very scary" when disciplining Aliyana.

¶27 Finally, Dr. Heinz testified that, although Aliyana and Maria had a relationship, he could not say that Aliyana recognized Maria as her mother. He

³ Maria admitted to neglecting Aliyana under WIS. STAT. § 48.13(10), which provides the child is in need of protection or services because the parent "neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child."

also testified that Maria is unable to care for Aliyana safely without appropriate supervision.

¶28 On these facts, the record sufficiently supports the jury's determination that Maria failed to assume parental responsibility based on the totality of the circumstances.

II. Constitutional Challenge

¶29 Maria next argues “the failure to assume parental responsibility statute, as applied to Maria in this case, is unconstitutional.” Whether a statute is unconstitutional as applied presents a question of law subject to independent appellate review. *Kenosha Cnty. DHS v. Jodie W.*, 2006 WI 93, ¶22, 293 Wis. 2d 530, 716 N.W.2d 845.

¶30 Both parties agree that Maria has a fundamental liberty interest in parenting Aliyana; therefore, any statute that infringes upon this interest is subject to strict scrutiny review. *See id.*, ¶41. Our supreme court has already determined the state's compelling interest underlying each ground for termination in WIS. STAT. § 48.415 is to protect children from unfit parents. *Id.* Therefore, in Maria's “as applied” challenge, we must determine whether § 48.415(6), as applied to Maria, is narrowly tailored to meet the state's compelling interest of protecting Aliyana from an unfit parent. *See id.*

¶31 Maria contends the failure to assume parental responsibility ground is unconstitutional as applied because her “due process rights were violated when she was found to have failed to assume parental responsibility based largely on her daughter's out of home placement.” (Capitalization omitted.) In support of this contention, Maria points to the Department's closing argument.

¶32 Specifically, Maria emphasizes the parts of the Department’s closing argument where it stated Maria is “not there when Aliyana gets up in the morning. She’s not there when Aliyana goes to bed at night It is one of the most basic things in raising a child. And for the last two years [Maria] has been absent in the evening.” She stresses the Department’s statement that, even with visitation, Maria has missed Aliyana’s morning and evening meals. Finally, Maria highlights the Department’s statement that “parenting a child is a 24-hour-a-day endeavor. It is a seven-day-a-week endeavor. [Maria] has not been there 24 hours a day, seven days a week, for her four year old child for the last two years, for nearly half of her life.”

¶33 Maria argues that “asking the jury to find grounds that Maria failed to assume parental responsibility based on [the Department’s] argument violates her substantive due process rights.” She contends that she did not ask for her daughter to be placed in foster care, and she analogizes her situation to that of the mother in *Jodie W.*, 293 Wis. 2d 530, ¶22. Maria asserts the Department cannot take Aliyana from her care, fail to make reasonable efforts to help reunite Maria with Aliyana, and then argue Maria failed to assume parental responsibility because Aliyana was not at home.

¶34 There are, however, a few problems with Maria’s “as applied” challenge to WIS. STAT. § 48.415(6). First, Maria’s argument begins with the improper assumption that the jury found she lacked a substantial parental relationship with Aliyana based on the fact that Aliyana was placed in foster care, which prevented Maria from caring for her twenty-four hours per day. However, as indicated above, the jury’s determination that Maria failed to assume parental responsibility and lacked that substantial relationship was supported by ample evidence other than Aliyana’s court-ordered foster care placement and resulting

limited time with Maria. Instead, the evidence supporting the verdict showed that Maria neglected Aliyana, that Aliyana did not recognize her as her mother, that Maria did not appropriately supervise or keep Aliyana safe, and that Maria harassed Aliyana.

¶35 This situation is not analogous to the one in *Jodie W.*, 293 Wis. 2d 530. In that case, the child was found to be a child in need of protection or services and placed in foster care while the mother, Jodie, was incarcerated. *Id.*, ¶¶4-5. One of the conditions for return was that Jodie obtain a suitable residence. *Id.*, ¶7. The department then petitioned to terminate Jodie's parental rights on the basis that Jodie, who remained incarcerated, failed to satisfy the condition that she obtain a suitable residence. *Id.*, ¶8.

¶36 Our supreme court reasoned that substantive due process required the state's action to terminate Jodie's parental rights be narrowly tailored to meet the state's compelling interest of protecting the child from an unfit parent. *Id.*, ¶41. It stated that, in Jodie's case, the court-ordered CHIPS conditions for return were not narrowly tailored to meet that interest because Jodie was found to be an unfit parent solely by virtue of her status as an incarcerated person without regard for her actual parenting activities or the condition of her child. *Id.*, ¶¶55-56. The court determined a parent could not be deemed unfit based on an impossible condition for return *without consideration of any other relevant facts and circumstances*. *Id.*, ¶56. Accordingly, it held that the continuing CHIPS ground for termination, as applied to Jodie, was not narrowly tailored to advance a compelling state interest and, as a result, Jodie's substantive due process rights were violated. *Id.*

¶37 Here, Maria is asking us to take a limited view of the record and determine that, based on this limited view, the failure to assume parental responsibility ground has been unconstitutionally applied to her. Unlike *Jodie W.*, the record here does not support Maria’s assertion that she was found to have failed to assume parental responsibility based solely on the fact that Aliyana was placed in foster care and Maria did not have twenty-four-hour care of her. Maria overlooks the evidence supporting the jury’s verdict—that she neglected Aliyana, that Aliyana did not recognize her as her mother, that Maria did not appropriately supervise or keep Aliyana safe, and that Maria harassed Aliyana. We therefore conclude WIS. STAT. § 48.415(6) as applied to Maria was narrowly tailored to meet the Department’s compelling interest of protecting Aliyana from an unfit parent.

¶38 Second, we observe that Maria’s “as applied” challenge appears to be focused more on the Department’s closing argument than the evidence supporting the verdict. We disagree with Maria’s characterization of the Department’s closing argument as violative of her right to due process because it told the jury to find she failed to assume parental responsibility on an improper basis—i.e., that Aliyana was in foster care. Although the Department did make comments concerning Maria’s lack of contact with Aliyana after Aliyana was removed from Maria’s care, taken in context, it is clear the Department was arguing only that Maria’s own actions prevented her from assuming parental responsibility of Aliyana. In addition to these comments, the Department emphasized Maria’s admission to neglecting Aliyana; the safety issues observed by White and Matthys during visits; Maria’s knowing failure to address her mental illness issues by refusing to take medications as prescribed; her unrealistic expectations for Aliyana; and Maria’s statements clearly evidencing her inability

to understand a parent/child relationship, including that Aliyana wanted Maria to be mean in regard to discipline, that Aliyana was “the devil” behind closed doors, and that Aliyana tried to make Maria hate her.

¶39 Finally, we reject Maria’s assertion that the failure to assume parental responsibility ground is unconstitutional as applied because the jury determined the Department did not make reasonable efforts to provide the court-ordered services. The continuing CHIPS ground and the failure to assume parental responsibility ground are separate grounds that are not dependent on each other. *See* WIS. STAT. §§ 48.415(2), 48.415(6).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

